IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 1.11.2006

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

W.P.Nos.34394, 34650, 35921, 35944, 35972
36346 and 36486 of 2002

K.V.Nagarajan .. Petitioner in all W.Ps.

Vs

1. The Deputy Commercial Tax Officer
   Kumbakonam-III
   Kumbakonam

2. The State of Tamil Nadu
   rep. by Deputy Commissioner
   of Commercial Taxes
   Tiruchirapalli Division
   Tiruchirapalli.

3. The Registrar
   Tamil Nadu Taxation Special Tribunal
   Chennai-1. .. Respondents in all

PRAYER: Petitions under Article 226 of the Constitution of India for issue of writ of Certiorari to call for the records in T.C.(R) Nos.122, 125, 126, 121, 127, 123 AND 124 OF 1998 respectively dated 11.3.2002 on the file of the third respondent and to quash the same.

For Petitioner : Mr.K.Ramagopal in all the petitions

For Respondents: Mr.Haja Nazirudeen
Special Government Pleader
(Taxes) in all the petitions

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JUDGMENT
(Delivered by P.D.DINAKARAN,J.)

These writ petitions arise out of the common order of the Tamil Nadu Taxation Special Tribunal, Chennai dated 11.3.2002 made in T.C. (R) No.121 to 127 of 1998, raising a question, whether in a case, where, the petitioner has undertaken manufacture and supply of RCC

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Poles to the Tamil Nadu Electricity Board (for brevity, "the Board") at an agreed rate, agreeing for the manufacturing work as per the terms of the agreement dated 17.3.1990 entered into between the petitioner and the Board, which agreement provides for supply of raw materials like cement and steel required for the work to be supplied by Board; the petitioner has to make his own arrangement for transport and storage of the said materials; if steel is not available with the Board, the petitioner may provide the required quantity for the work at his own cost, and recover the same out of the final bills; the petitioner has to return the excess materials and gunny bags after the completion of the work; the income tax payable on the contract amount bill would be deducted from and out of the payment to be made to the petitioner in accordance with the provisions of the Income Tax Act, 1961 as tax deducted at sources (TDS); the payment of the Sales tax, if any made applicable by the Government of Tamil Nadu for the pole manufacturing works shall be borne by the Board and the contractor is entitled to make claim if any on production of the notice issued by the Government of Tamil Nadu, the said contract was for sale of goods, viz., RCC Poles or contract for work, for the supply of the labour, out of the materials supplied by Board.

2. To decide the above question, we are constrained to look into the essence of the agreement and find out what was the intention of the parties in making the contract, viz., Manufacture of RCC Poles and Grills out of the materials supplied by the Board and transfer to the Board; and to decide whether such transaction is substantial one for execution of work or is for performance of some service or sale of RCC Poles by themselves, qua the assessment years 1989-90 to 1994-95.

3.1. All these writ petitions arise out of a single agreement entered into between the petitioner and Board on 17.3.1990, which was accepted and acted upon by the said parties for manufacture and supply of 3000 Nos. 7.5 Mtrs. RCC Poles and Grills. Pursuant to the said agreement, the Board also obtained a certificate of registration dated 26.6.1992, under the provisions of Central Excise Rules, specifically mentioning the address of manufacturing yard as there own premises situated at S.No.162/1, Kadiramangalam, Mayiladuthurai Taluk. Subsequently, the Board also paid excise duty for having manufactured the said poles.

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3.2. Before proceeding further, it is apt to refer to some of the vital terms and conditions of the agreement dated 17.3.1990 entered into between the petitioner and Board.

3.2.1. It is specifically agreed that the petitioner/ contractor shall execute the work on the description specified by the Board by piece-work and in accordance with the conditions noted in the agreement for the quantity of work to be executed as per the said agreement. The agreement also defines piece-work as that which

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involves a payment for work done at stipulated rate only without reference to a total quantity or time.

3.2.2. Condition (1) of terms and conditions of the tender provides that a list of materials proposed to be supplied by the Board and the place where and the prices at which they are proposed to be supplied is given in the tender, and the tenderer must accept these materials at the specified prices and quote for finished work accordingly.

3.2.3. Condition (2) of terms and conditions of the tender provides that subsidiary items such as water for work, clearing and marking out side, hire of tools and plant should be separately entered.

3.2.4. Condition (5) of terms and conditions of the tender provides that the tenderer is expected to inspect the site of the proposed work, inspect the quarries and satisfy himself about the quality and availability of materials to be supplied by the Board. If the contractor, after examination of the source of the materials, is of the opinion that materials complying with the standard or other specification of the contract cannot be obtained in quality or sufficient quantity from the source, he shall so state clearly in his tender and state where from he intents to obtain materials subject to the approval of the Assistant Engineer.

3.2.5. The agreement specifically provides that the tenderer shall execute the work for the Board by piecework.

3.2.6. Schedule-B of the agreement deals with the submission of tender and clause 1.7 (a) provides that the allotment of work shall be according to the capacity of the contractor and may be varied from time to time to suit the exigencies and overall programme of work.

3.2.7. Clause 2.0 of Schedule-B of the agreement provides that Income tax payable on the contract amount at the appropriate rate levied from time to time will be deducted from and out of the payment to be made to the contractors in accordance with the provision of the Income Tax Act, 1961 as amended from time to time.

3.2.8. Clause 10.1 of Schedule-B of the agreement provides that the Board's officers should have free access to inspect and examine the workmanship, materials used, etc., at any time and qualified supervisory staff of the contractor should be available at site so that clarifications if any required by the Board's officers could be furnished then and there.

3.2.9. Clause 11 of Schedule-B of the agreement provides that no tax is payable as this is works contract.

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3.2.10. Clause 14 of Schedule-B of the agreement provides that the Board reserves the right to depute a representative for inspecting the manufacturers works. The entire operation involved in the manufacture of poles and stores shall be opened at all times to the inspection of inspecting officers.

3.2.11. Clause 15 of Schedule-B of the agreement provides that if the contractor is found not exercising adequate care to ensure standard quality of workmanship, he will be warned, in writing, by the Executive Engineer, Assistant Executive Engineer. If he does not improve in spite of written warnings his contract will be terminated and the Earnest money deposit will be forfeited. Payment will not be made for poles which are found defective in workmanship or quality or due to improper curing.

3.2.12. Clause 17.01 of Schedule-B of the agreement provides that the poles to be cast should be as per drawing.

3.2.13. Clause 22.6 of Schedule-B of the agreement provides that the poles which are tested satisfactorily for strength will be accepted for supply. The poles are liable to be rejected, if the results of tests conducted on samples are not satisfactory.

3.2.14. Clause 25.0 of Schedule-B of the agreement provides that the cement and steel will be supplied at Central Stores subject to availability at Thiruvarur, Thanjavur Electricity Distribution Circle/East/Thanjavur. The contractor has to make his own arrangements for transport and storage, etc., and the contractor has to make his own arrangement for devolution of scraps and draw materials if necessary. If steel is not available in the department, the Contractor may provide the required quantity of steel for the work at his own cost.

3.2.15. Schedule-D of the agreement provides for provision of health and sanitary arrangements for the workers, who would be employed by the petitioner, in the works contract place.

3.2.16. Schedule 'E' provides the special conditions, of which Clause (1) provides that no part of the contract shall be sublet.

3.2.17. Clause (5) of Schedule 'E' of the agreement provides that Income Tax payable on the contract amount bill, the approximate rates based from time to time will be deducted from and out of the payment to be made to the contractors in accordance with the provisions of the Income Tax Act.

3.2.18. Clause (6) of Schedule 'E' of the agreement provides that the contractor should return all the materials, if any, after

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completion of work. If not returned, recovery will be made at the rates prevailing in the Board with other charges without intimation.

3.2.19. Clause (8) of Schedule 'E' of the agreement provides that great care should be taken to preserve and return the gunny bags to the department. Recoveries for the empty gunny bags not returned in good condition will be charged at Rs.1.50 per bag from the contractor's bill.

3.2.20. Clause (13) of Schedule 'E' of the agreement provides that the payment of the Tamil Nadu Government Sales tax if any made applicable by the Government of Tamil Nadu for this pole manufacturing works will be borne by the Board and have the contractor is entitled to make claim if any on production of notice issued by the Government of Tamil Nadu.

4. Under the above terms and conditions of the agreement entered into between the petitioner and the Board, the Assessing Officer, by order dated 24.2.1997, came to be conclusion that the supply of RCC poles by the petitioner to the Board is nothing but sale of finished goods, and the said view was also affirmed by the Appellate Assistant Commissioner (CT), Thanjavur in his order dated 21.5.1997. However, the Sales Tax Appellate Tribunal, Chennai, by order dated 29.1.1998, reversed the order of the Appellate Assistant Commissioner (CT), Thanjavur, and the said order of the Sales Tax Appellate Tribunal, was, on revision, at the instance of the Revenue, set aside by the Taxation Special Tribunal, Chennai and the order of assessment was confirmed. Hence, these appeals.

5. While Mr.K.Ramagopal, learned counsel appearing for the petitioner contends that the impugned agreement between the petitioner and the Board is a works contract and does not amount to sale of RCC poles, as weighed by the Sales Tax Appellate Tribunal in its order dated 29.1.1998, Mr.Haja Nazirudeen, learned Special Government Pleader (Taxes) contends in justification of the finding of the decision of the Taxation Special Tribunal in the revision.

6. Heard both sides at length.

7. To decide the question whether the manufacture and supply of RCC poles by the petitioner to the Board, pursuant to the agreement in question, is a works contract or a sale of RCC Poles by itself, we can straight-away refer to the definition of "sale" referred to under Section 2(n) and "works contract" referred to under Section 2(u) of the Tamil Nadu General Sales Tax Act, 1959, which read as under:

> "Section 2(n).- "Sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business

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for cash, deferred payment or other valuable consideration and includes-

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) a delivery of goods on hire-purchase or any system of payment by instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."

Section 2(u).- "Works Contract" includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning, of any movable or immovable property.

(emphasis supplied)

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8. Even before the introduction of Section 2(u) of the TNGST Act by Act 28 of 1984, notification dated 29.5.1984, with effect from 29.5.1984, the Apex Court in Hindustan Aeronautics Ltd. v. State of Orissa, [1984] 55 STC 327 held:

"The primary difference between a contract for work or service and a contract for sale of goods is that in the former there is in the person performing or rendering service no property in the thing produced as a whole notwithstanding that apart or

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even the whole of material used by him may have been his property. In the case of a contract for sale, the thing produced as a whole has individual existence as the sole property of the party who produced it sometime before delivery and the property therein passes only under the contract relating thereto to the other party for price."

9. As per the definition of "Sale" under Section 2(n) of the TNGST Act, there shall be a transfer of property in goods by one person to another in the course of the business for cash or valuable consideration as provided thereunder. Whereas, Section 2(u) of the TNGST Act, is an inclusive definition, which defines "works contract" as any agreement for carrying out the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning, of any movable or immovable property, for cash, deferred payment or other valuable consideration.

10. In the instant case, it is not in dispute that the agreement expressly provides for manufacturing of RCC Poles out of the raw materials agreed to be supplied by the Board and any excess material, including gunny bags, after the completion of the work should be returned to the Board; that the income tax payable on the contract amount bill would be deducted from and out of the payment to be made to the petitioner in accordance with the provisions of the Income Tax Act, 1961 as tax deducted at sources (TDS); and that the payment of the Sales tax if any made applicable by the Government of Tamil Nadu for the pole manufacturing works shall be borne by the Board and the contractors is entitled to make claim if any on production of the notice issued by the Government of Tamil Nadu, as the same is a works contract.

11. When raw materials supplied by Board are used for the manufacture of the RCC poles, it is beyond one's imagination as to how the RCC poles be sold to the owner of the raw materials himself, as there should be a transfer of the property in goods from one person to another as per the definition of "Sale" defined under Section 2(n) of the TNGST Act. The express terms of the agreement in question provides that cement, sand, water and everything is supplied by the Board and the petitioner cannot sell the same assuming, after manufacturing the same into a finished product, to the owner of the raw materials itself. What was added by the petitioner in the process of the manufacture is only value of work or labour, as clearly mentioned in the agreement itself as a works contract.

12. That apart, it is trite that when a word or a phrase is defined as having a particular meaning, it is that meaning which must be given to it, in interpreting a section of the Act, unless there is something repugnant in the context. When a legislature defines the

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language it uses, its definition is binding upon the Court and this is so even though the definition does not coincide with the ordinary meaning of the word used. It is not for the Court to ignore the statutory definition and proceed to try and extract the true meaning of the expression independently of it.

13. If that be so, we do not see any hesitation to hold that the views expressed by the Sales Tax Appellate Tribunal are perfectly valid and justified and are in consonance with the definition of the term "works contract" as defined under Clause 2(u) of the TNGST Act. The learned Special Government Pleader, of course, relied upon the decision in Steel Pipes & Fabrication Works v. State of Gujarat, [1993] 91 STC 506, but the said decision was also discussed and distinguished by the Sales Tax Appellate Tribunal, taking note of the fact that, in that case, the agreement provides for the contractor to retain the excess materials. Hence, the decision in the said case is not applicable to the facts and circumstances of the case on hand.

Hence, these writ petitions are allowed and the order of the Tamil Nadu Taxation Special Tribunal, Chennai dated 11.3.2002 made in T.C.(R) No.121 to 127 of 1998 is set aside and the petitioner is not liable to pay any penalty, wherever it is imposed. Consequently, W.P.M.P.Nos.51337, 51645, 53811, 53836, 54837, 53873 and 54641 of 2002 are closed.

sasi

Sd/
Asst.Registrar

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Sub Asst.Registrar

To:

1. The Deputy Commercial Tax Officer
   Kumbakonam-III, Kumbakonam

2. The Deputy Commissioner
   of Commercial Taxes, Tiruchirapalli Division
   Tiruchirapalli.

3. The Registrar
   Tamil Nadu Taxation Special Tribunal
   Chennai-1.

TWO CCS TO MR.K.RAMAGOPAL, ADVOCATE SR 51360 AND 51361

W.P.Nos.34394, 34650, 35921, 35944,
35972, 36346 and 36486 of 2002

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